

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRICK DORSEY,

Defendant-Appellant.

UNPUBLISHED

January 31, 2003

No. 235907

Wayne Circuit Court

LC No. 00-011221

Before: Jansen, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of carrying a concealed weapon (CCW), MCL 750.227, and sentenced to two years' probation. We affirm.

On appeal, defendant first argues that the trial court erred in denying his suppression motion. We disagree.

Both the United States and Michigan constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, sec 11; *Illinois v McArthur*, 531 US 326; 121 S Ct 946, 949; 148 L Ed 2d 838, 847 (2001); *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). In the criminal context, a search or seizure conducted without a warrant is unreasonable unless there exist both probable cause and a circumstance establishing an exception to the warrant requirement. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999); *People Lewis*, 251 Mich App 58, 69; 649 NW2d 792 (2002). The existence of probable cause depends on the totality of the circumstances. *United States v Arvizu*, 534 US 266, 273; 122 S Ct 744; 151 L Ed 2d 740 (2002).

Not all encounters between the police and citizens are "seizures," and the constitutional protections against unreasonable searches and seizures apply only to governmental conduct that may reasonably be characterized as a "search" or a "seizure." *People v Frohriep*, 247 Mich App 692, 699-700; 637 NW2d 562 (2001). Consequently, a person is only considered seized within the meaning of the Fourth Amendment if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave. *Michigan v Chesternut*, 486 US 567, 573; 108 S Ct 1975, 1981; 100 L Ed 2d 565, 572 (1988); *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). Thus, a person who is approached by an officer and asked questions is not, without some form of detention, subject to a seizure.

Florida v Royer, 460 US 491, 497; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion); *People v Shabaz*, 424 Mich 42, 56-57; 378 NW2d 451 (1985); *Shankle*, *supra* at 693.

The facts of defendant's arrest are as follows. Defendant, after getting out of a cab, was approached by police officers who identified themselves as such. The officers, who had received information about a cab leaving the scene of a narcotics raid, asked defendant whether he had any weapons. According to the officers, defendant replied that he had a gun. As a result, one of the officers conducted a "pat-down" search of defendant and found a Norinco 9-millimeter blue steel automatic pistol on his left hip, which was visible only after the officer moved defendant's sweater. Defendant was then arrested and placed in a police car.

Contrary to defendant's contention, there was no violation of the Fourth Amendment in this case. Specifically, defendant was not under arrest or seized before the police discovered the gun on his person. However, once defendant volunteered that he had a gun, the police officers had an articulable suspicion that defendant was committing a crime. *People v Beuschlein*, 245 Mich App 744, 750; 630 NW2d 921 (2001); *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). Thus, the search and seizure was reasonable because probable cause existed – notice of a firearm – and because there was an exception to the warrant requirement – stop and frisk to protect officer safety and exigent circumstances. *People v Blasuis*, 435 Mich 573, 582, 591; 459 NW2d 906 (1990); *Borchard-Ruhland*, *supra* at 294; *Lewis*, *supra* at 69.

Next, defendant argues that the trial court's finding that he possessed a gun was factually inconsistent with its decision acquitting him of possession of marijuana, and therefore clearly erroneous. We disagree.

Ordinarily, in actions tried without a jury, the trial court must find the facts and state separately its conclusions of law regarding contested matters. MCR 6.403; *People v Feldmann*, 181 Mich App 523, 534; 449 NW2d 692 (1989). A finding is clearly erroneous if, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Lewis*, *supra* at 69. Further, factual findings must be reviewed in the context of the specific legal and factual issues raised by the parties and the evidence. *People v Rushlow*, 179 Mich App 172, 177; 445 NW2d 222 (1989), *aff'd* 437 Mich 149 (1991).

The trial court's finding that defendant possessed a weapon was not inconsistent with the court's acquittal regarding charges of possession of marijuana, MCL 333.7403(2)(d). *Lewis*, *supra* at 69. When making its determination that defendant possessed a gun, the trial court avoided the evidence provided by the narcotics officers and relied solely on testimony from the patrol officers. The testimony of a single witness is sufficient to support a conviction if believed by the factfinder. *People v Taylor*, 18 Mich App 381, 384-385; 171 NW2d 219 (1969) *aff'd* 386 Mich 204; 191 NW2d 310 (1971).

Finally, defendant's claims that there was insufficient evidence supporting the trial court's verdict, or alternatively, that it was against the great weight of the evidence. We disagree.

When reviewing a sufficiency of the evidence claim, this Court reviews the record *de novo* and considers the evidence in the light most favorable to the prosecution to determine whether a reasonable trier of fact would find the essential elements of the crimes charged were

proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508; 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All evidentiary conflicts are resolved in favor of the prosecution. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

To convict a defendant of CCW, the prosecution must prove that (1) defendant carried a pistol, and (2) the pistol was concealed. CJI2d 11.1; *People v Davenport*, 89 Mich App 678, 682; 282 NW2d 179 (1979). CCW is a general intent crime. *People v Sturgis*, 427 Mich 392, 408; 397 NW2d 783 (1986). “[A] weapon is concealed when it is not discernible by the ordinary observation of persons coming in contact with the person carrying it, casually observing him, as people do in the ordinary and usual associations of life.” *People v Johnnie W Jones*, 12 Mich App 293, 296; 162 NW2d 847 (1968).

The prosecution presented sufficient evidence to establish that defendant committed the offense of CCW. Specifically, a pistol was recovered from defendant’s person. Testimony also established that the pistol had been secreted under defendant’s sweater and tucked inside his waistband. See *People v Jackson*, 43 Mich App 569, 571; 204 NW2d 367 (1972). The gun only became visible after the police officer moved defendant’s sweater, thereby supporting an inference of concealment. *Jones*, *supra* at 296. The question of concealment was one of fact, and the arresting officers’ testimony was sufficient to support the court’s finding. *Id.* at 297.

The prosecutor was not required to negate defendant’s theory of innocence but was only required to prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence defendant provided. The testimony of the police officers, if believed, directly discredited defendant’s theory. Questions of credibility and intent are properly left for the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). It was for the trial court, acting as the trier of fact, to determine what inferences could be fairly drawn from the officer’s testimony and to determine the weight accorded those inferences. *Hardiman*, *supra* at 428. Likewise, when assessing a sufficiency of the evidence challenge, all evidentiary conflicts are resolved in favor of the prosecution. *Harmon*, *supra* at 524. In light of these considerations, we conclude that the factfinder was presented with evidence sufficient to allow it to conclude that defendant was guilty of CCW beyond all reasonable doubt. *Harmon*, *supra* at 524.

Similarly, this Court cannot conclude the verdict was against the great weight of the evidence. While a new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence, such motions are not favored. They are only granted when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 639; 576 NW2d 129 (1998).

A determination whether a verdict is against the great weight of the evidence requires review of the entire body of proofs to determine whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). The issue usually involves matters of credibility or circumstantial evidence, *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765

(1989), but if there is conflicting evidence, the question of credibility ordinarily is left for the factfinder, *Lemmon, supra* at 642-643.

In arguing that his conviction was against the great weight of the evidence, defendant maintains that the officers' testimony was not credible. Because there is conflicting testimony in this case, we properly leave the issue of credibility to the factfinder. *Lemmon, supra* at 642-643. Here, the record evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id.* at 639.

Affirmed.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Hilda R. Gage